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IN THE

# Supreme Court of the United States

No. 74-863

October Term, 1975

COMMONWEALTH OF PENNSYLVANIA,
*Petitioner,*

v.

LARRY WHITE,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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IN THE

# Supreme Court of the United States

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COMMONWEALTH OF PENNSYLVANIA,
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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, the Commonwealth of Pennsylvania, by its Attorneys, John J. Hickton, District Attorney of Allegheny County, Pennsylvania, and John M. Tighe, First Assistant District Attorney, respectfully prays that a Writ of Certiorari issue to review the Opinion of the Supreme Court of Pennsylvania entered in this proceeding on October 16, 1974, relating to the Respondent, Larry White.

Pursuant to Rule 23 of this Honorable Court, your Petitioner respectfully represents as follows:

## Opinions Below

*Commonwealth v. Larry White.*

The Opinion of the Court of Common Pleas of Allegheny County appears in Appendix A hereto.

The Opinion of the Supreme Court of Pennsylvania, which is presently reported at: *Commonwealth v. White*, Pa. , 327 A.2d 40 (1974) and appears in Appendix B hereto.

## Statement of Jurisdiction

1. The Opinion of the Supreme Court of Pennsylvania was entered on October 16, 1974, and this Petition for Certiorari was filed within ninety (90) days of that date.

2. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1257(3).

## Question Stated for Review

Whether the Pennsylvania Supreme Court has erred in failing to recognize and apply controlling decisions of your Honorable Court setting forth the standards required to be met under the United States Constitution to accord standing to a criminal defendant to attack the legality of search and seizure of evidence?

## Constitutional Provisions Involved

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States in pertinent part provides:

> "no person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the Constitution of the United States in pertinent part provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

## Statement of the Case

*Commonwealth v. Larry White.*

Respondent was indicted at No. 168 and No. 169 January Sessions 1972, in the Criminal Courts of Allegheny County, Pennsylvania, on bills containing counts of Murder, Voluntary Manslaughter, and Involuntary Manslaughter. Respondent filed an Application to Suppress Statement on February 23, 1972, and an Application to Suppress Evidence on March 1, 1972. A Suppression Hearing was held on March 17 and 20, 1972 before the Honorable Henry R. Smith, Jr. Judge Smith entered Orders suppressing the Respondent's oral statement, but denying the suppression

of physical evidence secured by the Commonwealth. Exception was taken by the Respondent to the court's Order denying respondent's Application to Suppress Said Physical Evidence. On May 8, 1972, the Respondent, represented by retained counsel Byrd R. Brown, Esquire, entered a plea of *non cul.* Trial began before a jury and the Honorable Henry R. Smith, Jr. On May 12, 1972, the Respondent was found guilty of Second Degree Murder. Sentence was deferred pending a pre-sentence report.

Post-trial motions were filed on May 18, 1972 alleging, *inter alia*, that the court erred in admitting into evidence a certain coat and any other items allegedly seized from the home of Respondent.

A hearing thereon was held before a court, *en banc*, consisting of the trial judge and the Honorable Maurice Louik. By an Order dated February 28, 1973 and filed March 1, 1973, Judge Henry Smith reversed the Order of May 3, 1973 which had suppressed the physical evidence seized and granted the Motion for New Trial. The Commonwealth filed an appeal to the Pennsylvania Supreme Court on March 22, 1973 urging two issues, only one of which is pertinent to the present Petition. That issue attacked the lower court's Order following the post-trial motions that Respondent White had standing to question the validity of the search and seizure of physical evidence. The pertinent facts, contained in the record which bear upon this issue raised by Respondent White, are as follows:

Sergeant John Stack of the Pittsburgh Police Homicide Division testified that police records indicated that on November 19, 1971, a civilian ran into No. 2 Police Station and reported that he had seen a shooting (ST 69).[1] This

[1] Numerals in parentheses preceded by the letters "ST" refer to the pages of the Suppression Transcript.

witness gave the police a detailed description of a black leather coat which was worn by the perpetrator of the crime (ST 69). After the police were thus alerted, two officers near the scene of the crime took up pursuit of a running man who was wearing such a coat (ST 69). The police chased this man into the respondent's mother's home at 1814 Colwell Street (ST 70). *He reportedly emerged later without the coat* (ST 61).

On November 20, 1971, Officer James Cotter of the City Homicide Division presented a sworn affidavit for a search warrant before Magistrate Chapas, the subject of which was the leather coat (ST 50-51). While under oath, Officer Cotter related to the magistrate that he had reason to believe that the coat here in question was in the above-mentioned home at 1814 Colwell Street (ST 59). The information which lead Officer Cotter to make this included facts which had been related to him by Sergeant Stack (ST 64-65). He also relied upon facts which had been garnered from the investigation by the Homicide Division (ST 50-52) and also the above-mentioned reports by the civilian and by the two police officers (ST 69-70). Upon this information, a warrant was issued (ST 53).

Sergeant Stack, Officer Cotter, and two other officers proceeded with the warrant to the rooming house of the respondent's mother where they were admitted after identifying themselves (ST 54). The officers went to Mrs. White's room and displayed to her the warrant (ST 54). Respondent's mother then pointed to the coat rack where she had placed her son's coat when he left it earlier; Mrs. White told the officers that the search warrant was unnecessary (ST 54-55, 66-67). The coat was then obtained from the coat rack within Mrs. White's bedroom (ST 108). Evidence at the hearing indicated that the respondent had not lived in the

rooming house for some time but had been there only a day or so before this incident occurred (ST 109-110). It should be noted that the question of the respondent's standing to complain about the seizure of his coat was duly raised at the suppression hearing (ST 110-111).

On October 16, 1974, after oral argument before the Supreme Court of Pennsylvania, the Court entered an Order and Opinion which, among other things, affirmed the lower court's holding regarding the suppression of the physical evidence seized.

In summary, the Pennsylvania Supreme Court relied heavily on *Jones v. United States*, 362 U.S. 257, 261 (1960), in which your Honorable Court held that to have standing to attack a search or seizure, one must have been a victim of such search or seizure; the one against whom the search was directed, as distinguished from the one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.

However, the Pennsylvania Supreme Court failed to take note of a much later case, *Brown v. United States*, 411 U.S. 223 (1973). In *Brown, supra*, which assumedly supersedes *Jones, supra*, your Honorable Court set up standards for the determination of standing in those search and seizure cases where possession is not an element of the crime charged. Briefly, in *Brown, supra*, Mr. Chief Justice Berger stated that there was no standing to contest a search and seizure where the defendant: (1) was not on the premises at the time of the search, (2) had no proprietary or possessory interest in the premises, (3) was not charged with an offense that includes as an essential element of the offense charged possession of the seized evidence at the time of the contested search and seizure.

It was clearly improper, in the instant case, for the Pennsylvania Supreme Court to have used the criteria for standing stated in *Jones, supra,* as opposed to that stated in *Brown, supra.* In *Jones*, the defendant there was charged with a narcotics violation, a crime for which his possession of the seized property was a distinct element. Furthermore, the defendant was present on the premises at the time of the search.

Thus, even if *Jones* is not superseded by *Brown* on the question of standing generally, a reading of *Jones* shows the criteria for standing developed therein is inapposite to the present case, especially in light of the express criteria for standing espoused in *Brown.* The instant case meets each of the three conditions for denial of standing that are set forth in *Brown*, and thus *Brown*, not the much earlier decided *Jones*, should be controlling.

## ARGUMENT

### Reason for Allowance of Writ

**I. The Pennsylvania Supreme Court has erred in failing to recognize and apply controlling decisions of your Honorable Court setting forth the standards required to be met under the United States Constitution to accord standing to a criminal defendant to attack the legality of search and seizure of evidence.**

In *Commonwealth v. Larry White,* Pa. , 327 A.2d 40 (1974), the Pennsylvania Supreme Court ruled that an out-of-state defendant charged with Murder, who had two days prior taken a room in his mother's boarding house, had standing to attack the physical evidence, consisting of a black leather coat, a pair of sunglasses, and a

wallet, seized in his mother's bedroom. The Commonwealth contends that the Pennsylvania Supreme Court, in reaching its decision to allow Respondent White standing to attack the validity of the search and seizure in the instant circumstances, has failed to recognize and apply the controlling decision of your Honorable Court in *Brown v. United States*, 411 U.S. 223 (1973).

In *Brown, supra*, where the defendants were convicted of transporting stolen goods and of conspiracy to transport stolen goods in interstate commerce, contrary to 18 U.S.C. § 2314 and 18 U.S.C. § 371, your Honorable Court clearly set forth the requirements for standing to contest a search and seizure. Mr. Chief Justice Berger there stated:

> "In deciding this case, therefore, it is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants: a) were not on the premises at the time of the contested search and seizure; b) had no proprietary or possessory interest in the premises; c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." 411 U.S. at page 229, 93 S.Ct. at page 1569.

Clearly, the first and third of the above-mentioned criteria for denial of standing were satisfied. Respondent White was not present on the premises subjected to the search because at the time the Respondent was in the intensive care unit of Mercy Hospital (ST 118-119). And regarding the third criteria, the Respondent was charged with murder which, of course, does not have a possession element.

As to the second criteria set up in *Brown*, the Commonwealth contends that the Respondent had no "proprietary or possessory interest in the premises" subjected to the search. The Commonwealth's contention is based on the

fact that the search was limited to the bedroom of Respondent's mother, Elizabeth White, and the physical evidence subsequently taken into custody was found therein (ST 107-108). Mrs. White's bedroom was located on the second floor of a building which she owned and operated as a boarding house, and she had sole possession of both her bedroom, and sole control of the physical evidence seized therein.

It is well settled, of course, that "Fourth Amendment rights are personal rights which like some other constitutional rights may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165 (1969). Respondent is here seeking to vicariously assert Fourth Amendment rights for his mother. The Commonwealth submits that Respondent had no proprietary or possessory interest in his mother's bedroom and consequently had no standing to attack the legality of its search. This position is buttressed by the fact that the instant search took place in a boarding house with a common entrance wherein resided a number of guests (ST 107). Thus, the different residents of this boarding house reasonably held proprietary and possessory interest in their respective rooms. Respondent could not have reasonably expected more and should not have been granted more.

The mere fact that Respondent was the son of the owner of the boarding house, did not in the instant case give him any greater possessory rights than the rest of the guests. The record shows that Respondent was a guest himself. A resident of New York, he had only two days prior to the incident arrived in Pittsburgh (TT 374)[2]. Also, his visits to Pittsburgh and his mother's boarding house had been rare

[2] Numerals in parentheses preceded by the letters "TT" refer to the pages of the Trial Transcript.

in the past, his last having been more than two years previous (TT 377). Furthermore, since his childhood, he had never had a permanent residence there.

The record shows that Respondent, accompanied by a female friend from New York, was permitted by his mother to stay at her boarding house because "He didn't have no place else to stay" (ST 110). Although Respondent clearly had proprietary and possessory interests in the room of his mother's boarding house in which he and his female friend stayed, he, a 27-year-old man, had no such interest in his mother's bedroom. Only Mrs. White had the requisite proprietary and possessory rights to attack the search of her bedroom. However, it should be noted that the evidence obtained in the search was not used against Mrs. White, and she was never charged with any offense.

The only real nexus that the Respondent had with the instant search is that which arose from the possessory interest which he had in the physical evidence seized. However, *Brown* does not base standing upon the possessory interest of the goods seized, but rather on the proprietary and possessory interest of the premises searched.

The federal courts have consistently followed the guidelines as set forth in *Brown, supra,* as controlling in circumstances, as here, where possession is not an essential element of the offense charged. *United States v. Frick,* 490 F.2d 666 (5th Cir. 1973); *United States v. Moody,* 485 F.2d 531 (3rd Cir. 1973); *United States v. Pui Kan Lam,* 483 F.2d 1202 (2nd Cir. 1973).

It is the contention of the Commonwealth that the Pennsylvania Supreme Court improperly affirmed the lower

court's suppression of the physical evidence seized as a result of the search of Respondent's mother's room. Respondent's mother, not Respondent, was the focus of the search and only she would have standing to contest it.

## Conclusion

The Commonwealth asserts that the failure of the Pennsylvania Supreme Court to recognize the controlling decisions of your Honorable Court in the instant matter was contrary to the constitutional standards established by your Honorable Court. For the reasons stated above, it is urged that the instant Petition be granted or, in the alternative, that the Pennsylvania Supreme Court be summarily reversed.

Respectfully submitted,

JOHN J. HICKTON,
District Attorney,

JOHN M. TIGHE,
First Assistant District Attorney,

ROBERT L. EBERHARDT,
Assistant District Attorney,

*Attorneys for Petitioner.*

## APPENDIX "A"

### Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania

(Filed September 24, 1973.)

H. R. Smith, Jr., *J.*

### HISTORY OF THE CASE

The above named defendant, Larry White, was indicted at the above numbers and terms, charged with murder, voluntary manslaughter. The attorney for the defendant, Byrd R. Brown, Esquire, filed two separate pre-trial applications, one to suppress an alleged oral confession of the defendant, and the second to suppress various items of personal property seized as a result of a search at 1814 Colwell Street, Pittsburgh, Pennsylvania. The Commonwealth did not file any answers to the applications. Hearings were held on the aforesaid pre-trial applications.

After the hearing, the court sustained the defendant's application to suppress evidence secured pursuant to a certain search warrant. A statement of the Findings of Fact and Conclusions of Law was filed on May 3, 1972. Exception was taken by the defendant to the court's order denying defendant's application to suppress evidence seized pursuant to the search warrant. No exceptions were taken by the Commonwealth.

Thereafter, the defendant was tried before the court with a jury and was found guilty of Murder in the Second Degree on May 12, 1972. Timely post-trial motions for New Trial and In arrest of Judgment were filed, and sentence was deferred pending disposition of said motions. Said motions were argued before the court *en banc* and briefs were submitted. On February 28, 1973, the following order was made:

*Appendix "A"—Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania*

"ORDER OF COURT

AND Now, to-wit, this 28th day of February, 1973, Motions for New Trial and/or In Arrest of Judgment having been presented, the foregoing motions having been argued before the court en banc, and briefs having been presented and reviewed, after consideration thereof, IT IS HEREBY ORDERED that the order of court of May 3, 1972, with respect to the Motion to Suppress various items of personal property be and is hereby reversed and that the Motion to Suppress various items of personal property seized pursuant to a search warrant be and is hereby granted. AND IT IS FURTHER ORDERED that the Motion for a New Trial be and is hereby granted and the Motion in Arrest of Judgment be and is hereby denied.

BY THE COURT:
/s/ HENRY R. SMITH, JR.,
*J.*

I CONCUR:
/s/ MAURICE LOUIK,
*J.*"

Thereafter, the Commonwealth filed an appeal from the above stated order.

DISCUSSION

The Commonwealth has appealed from the order of court which reversed the prior decision on the Motion to Suppress and which ordered that the items of personal property seized pursuant to the search warrant be suppressed and that a new trial be granted. This order was made after arguments on the post-trial motions and a review of the prior ruling on the defendant's Motion to Suppress. It appears, therefore, that the Commonwealth has accepted

the court's ruling of February 28, 1973, with respect to the suppression of the confession.

The court has not been served with a statement of the questions that are involved and therefore may omit discussing some matters about which the Commonwealth is complaining. In this opinion the court has endeavored to recognize the points that had been made by the Commonwealth at the time of the post-trial arguments.

The Commonwealth seems to be making three principal contentions: (1) that the affidavit for the search warrant and the search warrant were valid and sufficient and the execution of the warrant was proper and, further, that the affidavit for probable cause was based upon sufficient independent information so as not to be tainted by information received by Detective John Stack at the time of the suppressed confession; and (2) that, if the affidavit to the warrant is not valid, consent to search the premises has been given by the defendant's mother; and (3) that the defendant has no standing to raise a question with respect to the search warrant.

The complaint and affidavit for the search warrant requests the issuance of a warrant to search the premises at 1814 Colwell Street, Pittsburgh, and to seize "one man's coat, black leather or what appears to be leather, ¾ length style, with a belt in the back," and states the following as probable cause for issuance of the warrant

> "That on November 19, 1971, one LARRY WHITE of the above address, did shoot and kill one James E. Ervin. The subject then fled the shooting scene wearing the above described coat. Subject then went into the above

> home, his mother's home, being pursued by police officers. He fled this residence again not wearing this coat and it is felt he left this article in the above residence."

The complaint and affidavit were sworn to by James W. Cotter, of the Homicide Squad of the Pittsburgh Police Department.

The search warrant was issued and executed by Officer Cotter and other police on November 20, 1971, at 11:55 A.M., at which time a search was made of the premises at 1814 Colwell Street. Officer Cotter seized the following items as a result of the search:

> "(1) man's leather coat, belt in back, size 42, also wallet with personal papers for Larry White, also 1 pr. of men's glasses. These articles were identified by White's mother Elizabeth White, or her sons."

The Commonwealth contends that (1) the affidavit of probable cause for issuance of the search warrant is proper and sufficient; and (2) that there was an independent source of information supporting the probable cause for issuance of the search warrant which was not tainted by the illegal evidence (defendant's confession) previously suppressed by this court. This court finds that the contentions of the Commonwealth are supported by neither the law nor the testimony offered by the Commonwealth at the suppression hearing.

As to the probable cause, or lack of it, for issuance of the search warrant, this court has relied upon the standards set forth in *Spinelli v. U.S.*, 393 U.S. 410, and *Aquilar v. Texas*, 378 U.S. 108, and numerous Pennsylvania cases, to be

followed in obtaining a search warrant. When the affiant is not relying upon information obtained from his own personal observation, he is then relying on information from an informant. In such circumstances, the affidavit must set forth that it is based upon information received and state sufficient reasons to support the conclusion that the information is "reliable."

An examination of the probable cause stated in the complaint for the warrant clearly establishes that Officer Cotter did not rely upon personal observations, nor did he state such in his testimony. Therefore, he was relying upon information revealed by others. Officer Cotter mentioned that he relied upon fellow officers, but the only one he mentioned before the magistrate was Sergeant Stack (Testimony, pages 82a, 83a, Suppression Hearing). Cotter further states (Testimony, page 79a, *supra*) that he told the magistrate that "we had reason to believe that coat was in that home," but he fails to state why he held such a belief.

The face of the affidavit shows that there is no probable cause for its issuance, there being only a blanket statement of facts concerning an alleged crime without any indication as to the source of the information. The information related to the magistrate having been derived from the report of Sergeant Stack and from reports from other informers (other police officers and witnesses), the affidavit should so state. His failure to state such renders the affidavit defective.

Officer Cotter related to the magistrate that, in making his complaint, he had relied upon the information received from Sergeant Stack. A significant portion of the informa-

tion which Sergeant Stack had placed in his report was information received from the defendant when he was questioned at the hospital. And the court has found that the information (confession) given by the defendant was wrongfully obtained. Thus arises the question of whether or not the affidavit of probable cause falls within the scope of the "fruit of the poisonous tree" doctrine. The court concludes that, inasmuch as the evidence obtained was the direct result of a search warrant tainted by information derived from suppressed evidence, it is hereby impermissible evidence. *Wong Sun v. U. S.*, 371 U.S. 471, 83 S. Ct. 407 (1963); *Commonwealth v. Garvin*, 448 Pa. 258 (1972).

Such being concluded, the Commonwealth, in order to support the issuance of the warrant, had the burden of establishing that the taint was removed by proving independent facts and circumstances free of the taint. *Commonwealth v. Garvin, supra; Commonwealth v. Bajet*, ____ Pa. Super. 295 A.2d 493. The Commonwealth failed to meet this burden.

Therefore, even if it should be held that the affidavit of probable cause be technically sufficient, the information on which the affidavit was based was tainted information and thus the warrant issued invalid.

III.

The Commonwealth further contends that, even if the search warrant was invalid, the mother of the defendant (the owner of the home in which the search took place) consented to the search.

*Appendix "A"—Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania*

The Fourth Amendment protection against unreasonable search and seizure may be waived (*Commonwealth v. Anderson,* 208 Pa. Super. 323; 222 A.2d 495 (1966), but the consent must be given "freely." Consent given under the belief that a valid search warrant exists is no consent at all. *Bumper v. North Carolina,* 391 U.S. 543 (1968). The test as set down in the courts of Pennsylvania traditionally has been the "totality of circumstances" test. This test is to measure free will versus a mere submission to apparent authority. In the testimony at page 74a, *supra,* Officer Cotter states that in fact he "showed her the search warrant," and that she did not even get out of bed while the search took place but merely directed the officers to the evidence from the bed. This passive behavior in the face of police officers, with search warrant in hand, indicates to this court that there was less than an intelligent and voluntary consent on the part of the mother. In any case, the burden of coming forward with proof that a valid consent existed is upon the Commonwealth. The Commonwealth did not meet that burden.

III.

The Commonwealth questions the right of the defendant to contest the search because the seized evidence was found at the residence of his mother and in her control. As the return on the search warrant indicates, and the testimony supports, the evidence in question was found in the bedroom of the mother on premises which were apparently controlled and in which she said she rented rooms. The testimony also indicated that the defendant had been at the home for a day or so prior to the search. Under these circumstances,

the court finds that the defendant does possess the necessary standing to object to the search.

The general rule is that so long as the objecting person is the one against whom the search has been directed rather than against whom the evidence has been used, the evidence should be admitted. In the instant case the search was directed solely against the defendant as it becomes apparent from the examination of the affidavit and complaint for the warrant and the warrant itself. *U. S. v. Mazurkiewicz,* 316 F. Sup. 1041 (D.C. Pa. 1970) and *Commonwealth v. Smith,* 193 A.2d 778 (1963).

In further consideration, the holdings have been generally that one has the right to claim the protection of the Fourth Amendment even though he may not have a property right in the searched premises, but when he does have a right to believe that the area searched is one in which he had a reasonable expectation of freedom from government intrusion. *Commonwealth v. McCloskey,* 217 Pa. Super. 432, 272 A.2d 271 (1970); *Mancusi v. DeForte,* 392 U.S. 368. The evidence in this case indicates that this was the defendant's mother's home and a place in which he had apparently stayed for a brief period of time. Under these circumstances, it would be reasonable to assume that the defendant son might expect that the premises which he had used and where he had left some of his personal belongings would be protected by the Fourth Amendment.

*Appendix "A"—Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania*

## CONCLUSION

In consideration of the foregoing, this court finds that it had erred in not suppressing the evidence seized at 112 Dinwiddie Street, to-wit, man's leather coat, wallet, etc. Therefore, after post-trial motions and arguments before the court *en banc,* the ruling was reversed. In view of these circumstances, the court granted a Motion for New Trial in order to allow the Commonwealth to present such evidence as it wishes without presenting the evidence found to be tainted and in order to grant the defendant's motion, the grounds of which the court has found to be well founded.

## APPENDIX "B"

**Opinion of the Supreme Court of Pennsylvania in *Commonwealth v. White***

[285]

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

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COMMONWEALTH OF PENNSYLVANIA,
*Appellant,*

v.

LARRY WHITE,
*Appellee.*

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No. 118 March Term, 1973

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Appeal from the Order of the Court of Common Pleas, Criminal Division of Allegheny County, Pennsylvania, Nos. 168 and 169 January Sessions, 1972.

### OPINION

JUSTICE MANDERINO: Filed: October 16, 1974.

Appellee, Larry White, was convicted by a jury on May 12, 1972, of second degree murder for the shooting death of Joseph E. Erwin. Prior to the trial, appellee's motion to suppress various items of personal property seized as the result of a police search of his mother's residence was denied. Appellee renewed his objection to the admission of

the fruits of this allegedly illegal search in his post-verdict motions. On February 28, 1973, the trial court reversed its prior decision and ordered that the items of personal property seized pursuant to an illegal search warrant be suppressed and that a new trial be granted. The prosecution now appeals from that order.

The prosecution does not contest the trial court's conclusion that the search warrant was defective. It raises, however, the following two issues. The first is whether the search and seizure pursuant to an invalid warrant was legally justified in that the appellee's mother voluntarily consented to the search. The second issue is whether the appellee, a temporary resident in his mother's home, had standing to question the validity of the search of that home and the seizure of his personal property.

The factual context in which appellee's mother consented to a search of her home is strikingly similar to that in *Bumper v. North Carolina*, 391 U. S. 543, 20 L.Ed.2d 797, 88 S. Ct. 1788 (1968). In *Bumper*, the defendant was convicted of rape based partially upon evidence obtained from a police search of the home where defendant and his 66-year-old grandmother lived. Two days after the alleged rape, four police officers went to the home and were met at the front door by the grandmother. One of the officers stated "I have a search warrant to search your house." To this, the defendant's grandmother replied "Go ahead," and opened the door. A rifle was then discovered in the kitchen which was later introduced into evidence at trial. *Bumper* held that under those circumstances there was no voluntary consent to the search. *Bumper* said,

*Appendix "B"—Opinion of the Supreme Court of Pennsylvania in Commonwealth v. White*

"When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. There can be no difference when it turns out that the State does not even attempt to rely upon the validity of the warrant, or facts to show that there was, in fact, any warrant at all.

When a law enforcement official claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent."

*Id.* at 549-50, 20 L.Ed.2d at 802-03, 88 S. Ct. at ____.

On the day after the crime in the present case, three police officers went to the rooming house in which the appellee's mother occupied a second-floor apartment. They were announced and admitted into the apartment by a neighbor. The officers identified themselves to appellee's mother who was sitting in bed, showed her a search warrant, and indicated that they were looking for her son's black leather coat. Appellee's mother did not get out of bed while the search took place, but directed the officers to the coat. When she questioned their request for the production of appellee's glasses and wallet, one of the officers indicated that the warrant covered those articles as well as the coat.

*Appendix "B"—Opinion of the Supreme Court of Pennsylvania in Commonwealth v. White*

Under the facts presented, we must conclude that the appellee's mother did not voluntarily consent to the search of her apartment, but rather acquiesced to a claim of lawful authority. Appellee's mother did nothing which would evidence an intent to aid the police in their quest for evidence until after she was presented with what appeared to be a valid search warrant by an individual apparently authorized to serve it. Her subsequent cooperation did not constitute a waiver of her constitutional right to be secure against unreasonable search and seizure, but rather was a submission to the law. Appellee's mother did not get out of bed during the search. When she thought that the police were exceeding the scope of the warrant, she objected. She submitted to the seizure of the glasses and wallet only after the police informed her that those items were also covered by the warrant. Since the search warrant was defective and there was no voluntary consent to the search, the trial court did not err in its conclusion that this was an illegal search and seizure. *Bumper v. North Carolina*, 391 U. S. 543, 20 L.Ed. 2d 797, 88 S. Ct. 1788 (1968).

The prosecution next contends that even if the search was not legally justified, the appellee has no standing to object to the admission of evidence obtained as a fruit of the illegal search because the illegal police conduct did not violate any rights of appellee.

The fourth amendment to the Constitution of the United States guarantees that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." To the same effect is Pa. Const. art. I, § 8. These

rights are personal in nature. *Commonwealth v. Ross,* 452 Pa. 500, 307 A.2d 898 (1973). "There is no necessity to exclude evidence against one [person] in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some third party." *Alderman v. United States,* 394 U. S. 165, 174, 22 L.Ed.2d 176, 187, 89 S. Ct. 961 (1969). In order to obtain standing to challenge the legality of the search, appellee must establish that he, rather than his mother, was the victim of an invasion of privacy.

*Jones v. United States,* 362 U. S. 257, 261, 4 L.Ed.2d 697, 702, 80 S. Ct. 725, ____ (1960), held that "[i]n order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, *one against whom the search was directed,* as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."

In this appeal, the prosecution argues that the search was not directed against the appellee since the appellee was in the intensive care unit of the hospital at the time of the search. It contends that the search was directed at appellee's mother who was in sole possession and control of both the premises and the physical evidence at the time of the search. The prosecution, therefore, contends that only the mother's constitutional rights were violated. We cannot agree.

Appellee's physical absence from the home at the time of the search does not establish that the search was not directed at appellee or that it did not violate his right of

privacy. An individual's *effects* and *possessions* are constitutionally protected from unreasonable search and seizure as well as his person. U. S. Const. amend. IV, Pa. Const. art. I, § 8. This protection does not depend on the physical presence or physical absence of the individual owner. "So long as a person seeks to preserve his effects as private, even if they are accessible to . . . others, they are constitutionally protected. Stated differently, a person must maintain the privacy of his possessions in such fashion that his 'expectations of freedom from intrusion are recognized as reasonable.'" *Commonwealth v. Platou,* 455 Pa. 258, 266-67, 312 A.2d 29, 34 (1973,) *cert. denied,* ____ U. S. ____, 41 L.Ed.2d 1146, 94 S. Ct. 3183 (1974). *See also Mancusi v. Deforte,* 392 U. S. 364, 20 L.Ed.2d 1154, 88 S. Ct. 2120 (1968). In this case, there is no evidence that appellee meaningfully abdicated his control, ownership, or possessory interest in the items seized. He did not sell them, give them away or abandon them. Instead, he left them in the apparent safety and security of his temporary residence, his mother's apartment. One must, therefore, conclude that appellee had a reasonable expectation that such items would be free from government intrusion whether or not he was physically present.

The prosecution's argument that the search was directed solely at the appellee's mother ignores the fact that the complaint and affidavit for search warrant and the warrant itself contained the information that appellee had been charged with the murder of Joseph E. Erwin, that appellee resided at his mother's address, and that it was believed that appellee's black leather coat which was identified at the scene of the crime was located at the above address.

*Appendix "B"—Opinion of the Supreme Court of Pennsylvania in Commonwealth v. White*

Appellee's mother was not mentioned in any of these documents nor has she ever been implicated in any manner in the commission of the crime. Under these circumstances it must be concluded that the search was directed at the appellee who had a reasonable expectation of privacy. The trial court did not err in holding that appellee had standing to challenge the search as an unconditional invasion of his right of privacy. We conclude that article I, section 8 of the Pennsylvania Constitution and the fourth amendment to the United States Constitution mandate that the order be affirmed.

The order of the trial court is affirmed.

[106] **APPENDIX "C"**

**Excerpts of Suppression Hearing Testimony**

Elizabeth White—Re-direct.

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EXAMINATION by Mr. Brown:

Q. Mrs. White, when the police came to your house, made the search, do you have any recollection of that?

A. Yes.

Q. What day was that?

A. I don't know what day.

Q. Was it after you were in the hospital?

A. Yes.

Q. What time was it; do you recall?

A. I know it was—I know it was after eleven.

Q. In the morning or in the night?

A. In the day.

[107] Q. In the day. So, it would have to be then some day after you were in the hospital.

A. Yes.

Q. Did you let the police in?

A. No.

Q. Now, where you live, how many people live there?

A. Well, let's see: Myself, I have a rooming house.

Q. You have a rooming house.

A. Yes.

Q. How many entrances are there?

A. Well, one that you can—you have to come in the rear because it is a garage in the front of the house; and you can't come up the garage.

And, so, it is a front entrance; but we don't use it unless we go in the front on the porch.

*Appendix "C"—Excerpts of Suppression Hearing Testimony*

Q. Different people rent rooms in that same house; its that correct?

A. Yes.

Q. You were in bed, I understand it, when the police came.

A. Yes.

Q. Did anyone show you any paper that purported to be a warrant?

A. Well, he had a piece of paper; but I didn't read it.

Q. Was it shown to you?

[108] A. He asked me—well, he told me he came to get Larry's coat. So, he asked me what was in the coat?

I said: Well, was anything in the coat?

I know I told him the coat is over there. So what—he didn't get it. Someone else got it, one of the fellows that was with him.

So, he asked me, he said, was anything else in the coat?

I said: Glasses and wallet.

So he said: Well, where is the wallet?

Right here, I said. Right here in my stand.

So he said: Can I have that?

So I said: Well, do you have to take that?

He said: Well, I have a warrant for it, you know, get the stuff anyway.

So I gave him the wallet, and the glasses were laying on the thing. He wanted the glasses, too.

He didn't give it to me in my hand. He said: I have the warrant for it anyhow.

Q. Describe in words for the record what he did.

A. He was standing—I was sitting in the bed. I was sitting up in the bed, and he was standing beside me talking.

Someone else, I think it was, maybe two fellows, I don't know, I can't swear how many were with him; but I know it was two. And, so, [109] he asked me then, you know—

Q. Describe in words what he did with the piece of paper.

A. Oh. He said: Well, I have a warrant for it here anyway, you know, in his hand, he said.

Q. May we state for the record that the witness is, with her hands, flashing out and back short periods of time—

> Mr. Minahan: It seems to me that her hand is extending forward indicating somebody is holding a piece of paper.
>
> Mr. Brown: Right.
>
> The Witness: He did have a piece of paper.
>
> The Court: Sort of extending your hand forward like you did.
>
> The Witness: He said: I have a piece of paper here. I have a warrant here for it anyway, he said. So, I just gave it to him.
>
> Mr. Brown: Your witness.

EXAMINATION by Mr. Minahan:

Q. Mrs. White, this was your rooming house, I take it.

A. Yes.

Q. And Larry had not been there, not lived there for some time, I take it. He had been away from home; had he not?

[110] A. Yes.

Q. And he had only been there, say, a day or so before he went to the hospital; hadn't he?

A. Yes.

*Appendix "C"—Excerpts of Suppression Hearing Testimony*

Q. Of course, being his mother, you let him stay there.
A. He didn't have no place else to stay.
Q. Sure: How old is Larry, ma'am?
A. 27. January 16.
Q. Did he have other clothes there?
A. Yes, the ones he brought with him.
Q. The ones he brought with him. Was it his plan to stay there with you for some period of time?

Mr. Brown: I object to all of this as irrelevant.

Mr. Minahan: It is relevant to control; and, secondly, to standing to raise the grounds.

Mr. Brown: Well, Your Honor—

The Court: Standing to do what?

Mr. Minahan: Standing to complain, may it please the Court, that is, counsel seeks to raise Mrs. White's complaint on behalf of his own client. That is, it is my contention, that the defendant has no standing to raise any unlawful search and seizure.

Mr. Brown: If he was staying there; although, he may [111] be a visitor out of town. He certainly has that right. Anyone on the premises, anyone who has control of the premises or on the premises with the consent of the owner has the right to raise the question of illegal search and seizure. That is clear.

The Court: Well, the legal point that you are arguing, I don't understand what that has to do with the question. The objection as to the question that Mr. Brown raised.

I mean, you asked the question; and he raised the objection as to the other clothes. Now, how does that relate to the point?

*Appendix "C"—Excerpts of Suppression Hearing Testimony*

Mr. Brown: I didn't object to that. I objected to the question, whether or not he intended to stay there forever, like.

The Court: I see.

Mr. Brown: That is the only objection I raised.

The Court: I will still sustain the objection as to his intention, future intention.

By Mr. Minahan:

Q. Mrs. White, you described before us—excuse me, ma'am. I don't think anyone asked you that was it Sergeant Stack who had this piece of paper?

A. Yes.

Q. And, again, you were co-operative with him as you were in [112] the hospital; and when he said something about the coat, you said: Well, that is it over there, didn't you?

A. Yes, I had.

Q. You didn't have anything to hide. You wanted to be co-operative with the police. You showed him right away where it was.

A. Yes, I told him it was over there.

Mr. Minahan: Thank you, ma'am.

Mr. Brown: Any questions, Your Honor?

The Court: No questions. You may step down.

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[371] **APPENDIX "D"**

**Excerpts of Trial Testimony**

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DEFENDANT'S CASE

(Mr. Brown opens to the jury on behalf of the defendant.)

ELIZABETH WHITE, a witness called by the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Brown:

Q. What is your full name?

A. Elizabeth White.

Q. In the olden days you and I went to school together, is that right?

[372] A. Yes.

Q. You are Larry White's mother?

A. Yes, I am.

Q. Where do you live?

A. 1814 Colwell Street in the rear.

Q. Is there a front and rear entrance to your home?

A. Yes.

Q. I show you what has been marked as Commonwealth's Exhibit 13. Does that scene look familiar to you?

A. Yes.

Q. What is it?

A. It's a front of this doorway that's opened. That's the rear going into my house, and this other doorway my daughter-in-law, she lives in the front with my son.

Q. What is their name?

A. Richard and Audrey White.

Q. Now, after you go in the doorway, do you go into an alley?

A. No, you go on a little way past the walk and down about four steps and there's an alleyway about five or six steps into the yard.

Mr. Brown: Will you mark this, please.

(Whereupon, Defendant's Exhibit D, being a [373] photograph, was marked for identification.)

Q. I show you Defendant's Exhibit D and ask you if you can identify it.

A. Yes, this is coming down into the yard.

Q. That's looking right from your back door up to the street?

A. Yes. That is Henning Place right down into my back yard.

Q. That picture is taken from the opposite direction as the other one?

A. This is taken from my back yard this way.

Q. This is taken from the opposite direction?

A. Yes.

Q. They both apparently show the same vehicle?

A. Yes.

Q. Thank you.

Mr. Brown: With the Court's permission, I offer in evidence Defendant's Exhibit D, and ask permission to circulate it through the jury.

Mr. Minahan: No objection.

The Court: If there is no objection you may circulate it through the jury.

(Mr. Brown shows photographs to the jury.)

[374] By Mr. Brown:

Q. Now, in the earlier part of November, was Larry White living in Pittsburgh?

A. No.

Q. Where was he living?

A. New York, with his father.

Q. And when did he come home in November?

A. Two days before this happened.

Q. Do you know what day it was?

A. Well, I think it was a Wednesday, about the 17th.

Q. Did anyone come with him?

A. Rita Savage.

Q. He came down two days before the 19th, is that correct?

A. I imagine. About four or five o'clock that day.

Q. Did you have anyone to go pick him up at the bus station?

A. My daughter-in-law.

Q. What is her name?

A. Audrey White. He called from the bus station.

Q. Pardon?

A. He called from the bus station and there wasn't a cab there so I had to call a jitney from Erin and Dinwiddie.

Q. Where was your jitney station?

[375] A. Dinwiddie and Colwell.

Q. You didn't call Mr. Ervin's station?

A. No. I don't know the number of it up there.

Q. So he came home Wednesday afternoon, is that correct?

A. Yes.

Mr. Brown: Your witness.

*Appendix "D"—Excerpts of Trial Testimony*

CROSS EXAMINATION by Mr. Minahan:

Q. Now, Mrs. White, you say your son, the defendant in this case, was living in New York with his father?

A. Yes.

Q. How long had he been living there?

A. I don't know.

Q. Pardon me, ma'am?

A. I don't know. I can't say. I don't know.

Q. Was it more than a year or longer than a year?

A. I couldn't tell you.

Q. Pardon me?

A. I couldn't tell you. Frankly, I couldn't say. He stayed there a night because I didn't see him. I know that's where he was supposed to be staying.

Q. How do you know that?

[376] A. Because he called me.

Q. Did he call you from New York?

A. And I talked to his father also.

Q. Do you remember when he called you?

A. Yes.

Q. When was it, ma'am?

A. He called me before he came.

Q. That same day?

A. No. He had been calling me off and on.

Q. For what period of time had he been calling you?

A. I don't know.

Q. Was it over a year?

A. No.

Q. Was it less than a year?

A. Yes.

Q. Had you seen him in over a year?

A. No.

Q. In fact, it's a little longer than that, isn't it, Mrs. White?

A. Yes.

Q. In fact, it's considerably longer than that?

A. Not considerably.

Q. How much time would it be, ma'am?

[377] A. What do you mean, considerably? Years, you mean?

Q. More than a year?

A. More than a year.

Q. Could you tell me how much more?

A. Probably two years.

Q. Over two years?

A. Two.

Q. Was he still living in New York when you saw him over two years ago?

A. He was here.

Q. Was he here?

A. Yes.

Q. Was he here for any length of time?

A. No.

Q. Just a few days?

A. He was here about a month or so.

Q. Prior to the time that he came to stay with you for a month some two and a half years ago, he came from New York then, I trust, is that so?

A. Yes.

Q. And prior to that time how long had he stayed in New York?

A. How do you mean, sir?

[378] Q. I'm trying to get a time picture in my mind of how long before he came home and stayed that month he had been in New York.

A. I don't know.

Q. Was it more than a year?

A. When I seen the man?

Q. No, ma'am. I'm talking about the time that he came home and stayed with you for a month. The time before that, was it a year before that?

A. He had came home before then and stayed, I guess about a week or so. Now, I guess—what that date was, what night, I can't tell you that because I don't know.

Q. Do you know how old he was when he went to New York?

A. Well, he stayed with me off and on and his father since he was a little boy.

Q. You haven't seen very much of him since he was a little boy?

A. Yes, I have.

Q. You have?

A. Yes.

Q. Other than the month some two and a half years ago, did he stay here any length of time prior to that with you?

A. Prior to that, to those two weeks?

Q. Yes, ma'am.

[379] A. He comes and goes.

Q. Mrs. White, during the week in which he came home, you say around November 17th, you said he called you prior to coming home. Do you remember the date of that?

A. He called about two or three nights before that. He called a week before that and about a week before that, and he kept saying he was coming home to see us. He never come home so we just gave up.

Q. When he called and told you that, did you also talk with his father?

A. Talked with his father once.

Q. When was that, ma'am, approximately?

A. About two weeks before he came.

Mr. Minahan: That's all.

RE-DIRECT EXAMINATION by Mr. Brown:

Q. Did he tell you why he was coming in November?

A. He said he wanted all of us to be together for Thanksgiving.

Mr. Brown: That's all.

RE-CROSS EXAMINATION by Mr. Minahan:

Q. Was that the Tuesday call or the call two days before he came [380] home, the Tuesday before the 17th?

A. No, he called me a couple days before he came. It was somewhere on Sunday or Saturday. I know he called me Saturday night. He called me Friday night, Saturday night. I know that.

Q. Is that when you recall him talking about wanting to be home for Thanksgiving?

A. He had been saying he was coming home.

Q. Was that the same night that you talked to Mr. White?

A. No, I talked to him I told you about two weeks before.

Q. Excuse me. You're right. Thank you, ma'am.

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